

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The Utility Consumers' Action Network,

Complainant,

vs.

Pacific Bell Telephone Company and
AOL-Time Warner, Inc.,

Defendants.

Case 02-07-044
(Filed July 24, 2002)

**ADMINISTRATIVE LAW JUDGE'S RULING
DENYING MOTION TO DISMISS FOR LACK OF JURISDICTION**

1. Summary

AOL-Time Warner, Inc. (referred to herein as AOL¹) moves to dismiss the complaint against it brought by the Utility Consumers' Action Network (UCAN) on grounds that the Commission lacks jurisdiction over AOL. The motion is denied. The Commission has jurisdiction to enforce the provisions of Pub. Util. Code §§ 2889.9 and 2890 against non-utility entities that have caused unauthorized charges to appear on subscribers' telephone bills. The complaint

¹ AOL-Time Warner is the parent company of its Internet service provider subsidiary, America Online, Inc. For simplicity, this ruling refers to the two entities as AOL.

here alleges that AOL is such an entity and has caused such unauthorized charges.

2. Background

UCAN filed this action against Pacific Bell Telephone Company, now SBC California (SBC) and AOL on July 24, 2002, alleging that AOL Internet subscribers are being subjected to unauthorized toll charges on their telephone bills as a result of the actions of SBC and AOL. Specifically, UCAN alleges that one or both defendant companies reroute or otherwise convert telephone calls of their customers from local telephone numbers to toll numbers when customers attempt to dial up their Internet Service Provider (ISP). The complaint alleges that toll charges for such dial-up calls can mount to hundreds of dollars before customers receive their phone bills and learn that their Internet dial-up number was not toll-free.

SBC and AOL timely filed answers denying most of the allegations of the complaint. AOL states that it supplies lists of dial-up numbers to its subscribers and cautions the subscribers to check with their local phone company to be sure the numbers that they select are local calls. SBC states that toll charges for calls to ISPs should be borne by customers because they have exclusive responsibility for selecting the number to be dialed and the computer equipment that actually dials the number.

AOL on October 21, 2002, moved for a dismissal of the case against it on grounds that the Commission lacks jurisdiction over ISPs. UCAN opposed the motion in a response dated November 5, 2002. AOL was permitted to reply to the response and did so on November 15, 2002. Action on the motion was stayed while SBC conducted a study that the parties hoped might lead to settlement. At the request of the parties, the Commission in January of this year extended the

statutory deadline for resolution of this case to accommodate the settlement discussions. A prehearing conference was conducted on June 4, 2003, followed by a second prehearing conference on August 12, 2003. Settlement now appears unlikely. An evidentiary hearing in this matter has been scheduled. AOL's motion that it be dismissed for lack of jurisdiction is denied for the reasons set forth below.

3. Positions of the Parties

AOL asserts that the Commission does not have jurisdiction over ISPs like AOL because they are not public utilities. It states that the Commission has specifically disclaimed jurisdiction over ISPs. (*See, Broadband Report of California Public Utilities Commission in Compliance With the Mandates of Assembly Bill 1712*, at 23 (2002), stating that Commission jurisdiction over local telephone companies for universal service purposes does not include jurisdiction or authority over Internet services, such as Internet access provided by ISPs; *see also, Davenport v. AT&T Communications of California, Inc.*, Decision (D.) 99-06-026 (1999) (Commission does not have jurisdiction over ISP service or rates).) AOL states:

The only tenable relationship or affiliation with a "public utility" in California for purposes of this proceeding is that some AOL subscribers in California use telephone lines to call AOL for the purpose of accessing its internet service.... This, however, does not subject AOL to the Commission's jurisdiction any more than it would subject any other person or entity to the Commission's jurisdiction by the mere receipt of a telephone call from a California resident. (Motion to Dismiss, at 4-5.)

While acknowledging that AOL is not a public utility, UCAN argues that Pub. Util. Code §§ 2889.9 and 2890 give the Commission jurisdiction over a "nonpublic utility" that provides a product or service, charges for which appear on subscribers' phone bills. If those charges are unauthorized, the Commission

is empowered to levy penalties under the provisions of Pub. Util. Code §§ 2102 through 2114 against such entities “as if the persons, corporations, or billing agents were a public utility.” (Pub. Util. Code § 2889.9(b).) UCAN states:

At the heart of the complaint are customers who claim they called AOL at a number under the control of AOL which should have been free. Instead, at the precise time and duration of the call to AOL, their phone was in fact connected to a different, toll number. As a result, they received a charge on their phone bill to which they did not consent. Since they were dialing a number under the direction and control of AOL, if the complaints are verified through investigation, AOL would be in violation of section 2890. (UCAN Response, at 8.)

UCAN also relies on the Commission’s regulation of 976 and 900 services as supporting jurisdiction here, claiming that the Commission “has exercised jurisdiction over the ‘private entrepreneurs’ running 976 and 900 numbers, who like AOL now, provide information services accessible through the telephone.” (UCAN Response, at 9, citing *In re 976 Information Access Service*, D.87-12-038.)

AOL responds that Sections 2889.9 and 2890 provide jurisdiction over entities that, unlike AOL, generate “noncommunications” charges on telephone bills. It states that the Commission has held in its rules implementing those provisions (D.01-07-030, Appendix A) that, with respect to entities other than the phone company, the statutes apply only to charges for noncommunications-related products or services. The rules are intended to discourage “cramming” – the submission or inclusion of unauthorized, misleading, or deceptive charges for products or services on the subscribers’ telephone bills. According to AOL, the Commission’s rules apply to telephone corporations, billing agents and vendors of noncommunications-related products, and not to providers of Internet access.

As to 976 and 900 services, AOL argues that in D.87-12-038, the Commission “merely exercised its undisputed jurisdiction over telephone utilities to determine the extent to which they had to provide customers with a service to block access to 900 and 976 numbers.” (AOL Reply, at 7.) AOL states that the Commission in D.87-12-038 ordered local exchange carriers to offer central office blocking of the 976 Information Access Service that was a utility-tariffed offering, and the Commission did not exercise jurisdiction over the non-utility information service providers who used the 976 service.

4. Discussion

Generally speaking, in the absence of legislation otherwise providing, the Commission’s jurisdiction is limited to public utilities. (*County of Inyo v. Public Utilities Com.* (1980) 26 Cal.3d 154; *see also, Application of the Santa Clara Valley Transportation Authority*, D.02-12-053.) It is undisputed, however, that the Legislature from time to time grants authority to the Commission over non-utility entities. (*See, e.g.*, Pub. Util. Code §§ 314(b) [inspection of holding company records], 394.1 [jurisdiction over energy service providers], 739.5 [jurisdiction over certain mobile home park rates].) Section 2111 of the Code grants the Commission the ability to enforce its authority over “[e]very corporation or person, other than a public utility and its officers, agents, or employees” which or who knowingly violates orders of the Commission or aids or abets a public utility in such violation.

Similarly, Section 2889.9 grants limited jurisdiction to the Commission over non-utility persons or corporations that are responsible for placing unauthorized charges on subscriber’s telephone bills. Specifically, the statute provides:

If the commission finds that a person or corporation or its billing agent that is a nonpublic utility, and is subject to the provisions of this section and Section 2890, has violated any requirement of this article, or knowingly provided false information to the commission on matters subject to this section and Section 2890, the commission may enforce Sections 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, and 2114 against those persons, corporations, and billing agents as if the persons, corporations, or billing agents were a public utility.

AOL correctly points out that the Commission's interim rules adopted in D.01-07-030 to further the consumer protection purpose of Sections 2889.9 and 2890 apply only to "noncommunications-related products and services," whereas the Internet service provided by AOL is by definition a "communications-related" service.

However, the rules in D.01-07-030 were adopted in response to an amendment of Section 2890. Originally, Section 2890 dealt only with communications-related charges on telephone bills. Charges on telephone bills for noncommunications-related products and services were banned. The amendment of the statute, effective July 1, 2001, permitted such charges on telephone bills subject to consumer protection rules intended to discourage cramming. Accordingly, the Legislature in Section 2890.1 directed the Commission to adopt "any additional rules it determines to be necessary to implement the billing safeguards of Section 2890, for the inclusion of noncommunications-related products and services in telephone bills." (Emphasis added.)

For this analysis, the operative words in Section 2890.1 are "additional rules." The Commission in D.01-07-030 adopted rules in addition to those set forth in Sections 2889.9 and 2890 to discourage cramming for noncommunications products and services. Notwithstanding the

implementation of additional enabling rules by the Commission pursuant to Section 2890.1, the existing law already set forth in Sections 2889.9 and 2890 applies on its face to telephone bill charges for both communications-related and noncommunications-related products and services.

Thus, pursuant to the jurisdiction given it in Sections 2889.9 and 2890, the Commission two years ago levied a fine of \$1.75 million on a Kansas City aggregator of billings for telecommunications-related services such as voicemail. (*Investigation of USP&C*, D.01-04-036, *rehearing denied*, D.03-04-062.) Similarly, under the same jurisdictional authority, the Commission imposed fines and other sanctions against several billing companies that had caused unauthorized charges for telephone services to appear on subscribers' telephone bills in California. (*Investigation of Coral Communications*, D.01-04-035, vacated on other grounds, D.01-10-073.)

The primary purpose of Sections 2889.9 and 2890 is consumer protection, and the Commission has held that such statutes must be read expansively. In *Investigation of USP&C, supra*, the Commission stated:

Since section 2890 is a consumer protection statute, it must be given an expansive reading.... The California Supreme Court has provided guidance for interpreting consumer protection statutes such as §§ 2889.9 and 2890. In upholding Department of Motor Vehicles implementing an automobile repair consumer protection statute, the Court stated:

“This statute was passed as a remedial statute, designed to protect the public. The dominant concern of this statutory scheme is that of protecting the purchaser from the various harms which can be visited upon him by an irresponsible or unscrupulous dealer. Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society. As a remedial statute, it must be liberally construed to effectuate its

object and purpose and to suppress the mischief at which it is directed.” (Ford Dealers v. Dept. of Motor Vehicles, 32 Cal.3d 347, 356 (1982) (citations omitted).)

The statutes we consider today, §§ 2889.9 and 2890, have the same purpose – protection of the public – as the repair statutes in the Ford Dealers opinion. We will, therefore, follow the Supreme Court’s direction in liberally construing the specific provisions at issue here. (*Investigation of USP&C, supra*, at 31.)

The complaint here alleges communications-related violations of several provisions of Sections 2889.9 and 2890, including the following:

2890(a) A telephone bill may only contain charges for products or services, the purchase of which the subscriber has authorized.

2890(e) If an entity responsible for generating a charge on a telephone bill receives a complaint from a subscriber that the subscriber did not authorize the purchase of the product or service associated with that charge, the entity, not later than 30 days from the date on which the complaint is received, shall verify the subscriber’s authorization of that charge or undertake to resolve the billing dispute to the subscriber’s satisfaction.

Whether a subscriber’s dial-up call to the AOL Internet service can be deemed to be an unauthorized call under these provisions is a question of fact set forth in the complaint. Similarly, the parties dispute whether AOL is an entity “responsible” for generating toll charges for such a call. Nevertheless, as to the jurisdictional issue of whether Sections 2889.9 and 2890 extend the Commission’s jurisdiction to ISPs like AOL for complaints of this nature, this ruling concludes that they do.

IT IS RULED that Defendant AOL-Time Warner, Inc.’s Motion to Dismiss for Lack of Jurisdiction is denied.

Dated August 14, 2003, at San Francisco, California.

/s/ GLEN WALKER
(by Lynn Carew)

Glen Walker
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Denying Motion to Dismiss for Lack of Jurisdiction on all parties of record in this proceeding or their attorneys of record.

Dated August 14, 2003, at San Francisco, California.

/s/ ELIZABETH LEWIS

Elizabeth Lewis

N O T I C E

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